



United States Copyright Office

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June 26, 2020

James A. Larson, Esq.
Durham Jones & Pinegar, P.C.
3301 Thanksgiving Way, Suite 400
Lehi, UT 84043
jl Larson@djplaw.com

**Re: Second Request for Reconsideration for Refusal to Register Pillow Sculpture,
Correspondence ID: 1-3L2SVS6; SR # 1-7297601341**

Dear Mr. Larson:

The Review Board of the United States Copyright Office (“Board”) has considered Purple Innovation, LLC’s (“Purple’s”) second request for reconsideration of the Registration Program’s refusal to register a claim for a sculptural work titled *Pillow Sculpture* (“Work”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORK

The Work is claimed as a sculptural work. The sculpture is shaped like a rounded rectangular prism. The interior of the work is comprised of a grid of evenly-spaced, repeating hollow triangular prisms, and a flat band encircles the sides of the Work. The triangles in the grid curve downwards as they near the band. The Work is as follows:





II. ADMINISTRATIVE RECORD

On January 8, 2019, Purple filed an application to register a copyright claim in the Work. In a January 11, 2019 letter, a Copyright Office registration specialist refused to register the claim, finding that it was a useful article that did not contain any copyrightable authorship.

Initial Letter Refusing Registration from U.S. Copyright Office to James A. Larson (Jan. 11, 2019).

In a letter dated February 12, 2019, Purple requested that the Office reconsider its initial refusal to register the Work. Letter from James A. Larson to U.S. Copyright Office (Feb. 12, 2019) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work “is a useful article that does not contain any separable, copyrightable features.” Refusal of First Request for Reconsideration from U.S. Copyright Office to James A. Larson (June 20, 2019). The Office determined that the “overall rectangular-shape” of the pillow was a utilitarian aspect and found the only remaining artistic elements to be the “three-dimensional triangles” arranged in rows, an uncreative arrangement insufficient to support a copyright claim. *Id.* at 2–3.

In a letter dated September 5, 2019, Purple requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Letter from James A. Larson to U.S. Copyright Office (Sept. 5, 2019) (“Second Request”). In that letter, Purple argued that the Work contained “different sizes and shapes” in an artistic arrangement, attaching additional drawings and renderings of the Work in support of its argument. Second Request at 1. Purple further argued that the Work employed “arches and partial ellipses” in order to “give a viewer a pleasurable viewing experience,” and it pointed to other types of artistic works employing geometric shapes. Second Request at 2. Finally, Purple pointed to its use of a “coloring scheme” that differs from its “standard color scheme” as another example of a creative artistic choice. Second Request at 2.

III. DISCUSSION

A. The Legal Framework

1) Useful Articles and Separability

Copyright does not protect useful articles as such, which are defined in the Copyright Act as “article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. Importantly, however, artistic features applied on or incorporated into a useful article may be eligible for copyright protection if they constitute pictorial, graphic, or sculptural works under sections 101 and 102(a)(5) of the Copyright Act. This protection is limited to the “‘pictorial, graphic, or sculptural features’ [that] ‘can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.’” *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (quoting 17 U.S.C. § 101).

To assess whether an artistic feature incorporated into the design of a useful article is protected by copyright, the Office examines whether the feature “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other

tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” *Id.* at 1007; *see also* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924 (3d ed. 2017) (“COMPENDIUM (THIRD)”). This analysis focuses on “the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction [because the] statute does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature.” *Star Athletica*, 137 S. Ct. at 1013. Put another way, while useful articles as such are not copyrightable, if an artistic feature “would have been copyrightable as a standalone pictorial, graphic, or sculptural work, it is copyrightable if created first as part of a useful article.” *Star Athletica*, 137 S. Ct. at 1011; *see also* 17 U.S.C. § 113(a) (“[T]he exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.”); *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 (D.C. Cir. 1978) (holding that copyright protection is not available for the “overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape . . . may be”).

2) Distinction Between Ideas and Expression

Section 102(b) of the Copyright Act provides that copyright protection for expressive works does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). Section 102(b) codifies the longstanding principle, known as the idea-expression dichotomy, that copyright law protects the original expression of ideas, but not the underlying ideas themselves. The Supreme Court in 1879 held that the copyright in a book describing a bookkeeping system, with blank forms and ruled lines and headings, did not give the copyright owner the right to prevent others from using the bookkeeping system described nor “the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.” *Baker v. Selden*, 101 U.S. 99, 102–04 (1879).

“Mathematical principles, formulas, algorithms, or equations” are ineligible for copyright protection under section 102(b). *See* COMPENDIUM (THIRD) § 313.3(A). Though the Office is permitted to register a sufficiently original artistic description, explanation, or illustration of an idea, procedure, process, system, method of operation, concept, principle, or discovery, *see* H.R. Rep. No. 94–1476, at 56 (1976), “the registration [are] limited to the copyrightable literary, musical, graphic, or artistic aspects of the work . . .” COMPENDIUM (THIRD) § 313.3(A). This principle is manifested in the Office’s regulations, which bar copyright protection for “[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing.” 37 C.F.R. § 202.1(b). Originality springs from independent creation, not from discovering a yet-unknown mathematical principle. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991) (“[O]ne who discovers a fact is not its maker or originator. The discoverer merely finds and records.”).

Copyright’s merger doctrine, which states that idea and expression merge together when the expression cannot be separated from the idea, is a closely related principle that bars copyrightability of certain works. *See Baker*, 101 U.S. at 103 (explaining that if the “art” that a

book “teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public”); *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 68 (2d Cir. 1994) (“[W]hen the expression is essential to the statement of the idea, the expression also will be unprotected, so as to insure free public access to the discussion of the idea.”).

3) Originality

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low threshold. *Id.* The Court observed that “[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.” *Id.* at 363. It further found that there can be no copyright in a work in which “the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Id.* at 359.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). Some combinations of common or standard design elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a claim for copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See Feist*, 499 U.S. at 358 (finding the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not”). A determination of copyrightability in the combination of standard design elements depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass,

an oblong shroud, bright colors, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The language in *Satava* is particularly instructive:

It is true, of course, that a *combination* of unprotectable elements may qualify for copyright protection. But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.

Id. (internal citations omitted).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1; *see also Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

B. Analysis of the Work

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work is a useful article that does not contain the requisite separable authorship necessary to sustain a claim to copyright.

As the Office previously determined, and Purple implicitly concedes,¹ the Work is a useful article, specifically a pillow marketed as the Purple Pillow. The Copyright Act defines useful articles as those “having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101 (definition of “useful article”). Useful articles may receive copyright protection “only if, and only to the extent that,” they incorporate pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article. *Id.* (definition of “pictorial, graphic, and sculptural works”). The Board therefore must apply the test articulated by the Supreme Court in *Star Athletica* to determine whether sculptural features “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or

¹ *See* First Request at 1 (proposing use of *Star Athletica* test looking at “an artistic feature applied on or incorporated into a useful article”).

fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.” *Star Athletica*, 137 S. Ct. at 1007.

Applying this test to the Work, the Board finds that, under the first step of *Star Athletica*, there are two- and three-dimensional elements that can be perceived when viewing the Work. Under the second step, however, no elements of the Work that can be imagined separately from the useful article contain sufficient copyrightable authorship.

The overall shape of the Work, *i.e.*, the bounds of the rounded rectangular prism imagined separately from the triangular grid comprising the Work, is not protectable and cannot be the basis for a registration. This is the shape of the Work depicted in the deposit image showing a white case covering the purple design underneath. Copyright law only protects separable “pictorial, graphic, or sculptural features” that are “incorporate[d]” into the design of a useful article, 17 U.S.C. § 101, so the overall shape or form of a useful article is not protectable. Because the Board is required to imagine design features separately from the useful article, the overall shape of the useful article must be “left behind” “because the removed feature may not be a useful article.” *Star Athletica*, 137 S. Ct. at 1013–14; *see also* H.R. REP. NO. 94-1476, at 55 (copyright protection does “not cover the over-all configuration of the utilitarian article as such”).

The interior grid of hollow triangles is also incapable of conceptual separation from the useful article. The triangles have an “intrinsic utilitarian function” and thus are useful articles themselves. *See* 17 U.S.C. § 101 (useful article has “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information” and useful article may be a part of a larger useful article). Purple’s public statements² make clear that these triangles are wholly utilitarian.³ The fundraising page Purple used to launch the product describes the Work as “organized in hundreds of little triangles,” which “give the core of the pillow lateral strength so it retains its oh-so supportive, head-cradling comfort all night.”⁴ Purple further emphasized the utility of the grids by including the word “SCIENCE!” in all capital letters. Similarly, Purple’s current marketing materials refer to the triangular grid as a scientifically engineered “Purple Grid,” and the sales page for the pillow states the grid of triangles is “engineered to provide optimal neck support while comfortably cradling your head, so it supports you, not your chiropractor’s boat.”⁵ The intrinsic functionality of the triangular grid

² Though the Office does not generally take conduct investigations or make findings of fact during the application process, the Office may take administrative notice of matters known to the general public and does so with respect to Purple’s public statements. *See* COMPENDIUM (THIRD) § 602.4(C).

³ Purple argues that the triangular grid was “artistically arranged to give a view a pleasurable experience,” and “the artists made a conscious decision to use the shapes in this pattern to convey a creative piece of art,” First Request at 2, but the Board does not consider “the author’s inspiration for the work, creative intent, or intended meaning” in evaluating a work. COMPENDIUM (THIRD) § 310.5.

⁴ *Purple Pillow: The World’s First No-Pressure Pillow*, KICKSTARTER (last updated Mar. 13, 2018), <https://www.kickstarter.com/projects/227992716/purple-pillow-the-worlds-first-no-pressure-head-be>.




⁵ *The Purple Pillow*, PURPLE, <https://purple.com/pillows/purple-pillow> (last accessed May 5, 2020) (describing pillow as “[t]he sciencey way to keep a level head”); *see also* Purple, *The Purple Pillow: Weird + Comfort =*

means that it cannot be conceptually separated from the rest of the useful article without the triangular grid being “left behind” entirely. *See Star Athletica*, 137 S. Ct. at 1013–14.

Courts applying the *Star Athletica* test have carved out utilitarian features on similar grounds, supporting the Office’s conclusion here. In a case involving a banana costume, the Third Circuit carved out from copyright protection the dimensions and locations of cutout holes for arms, legs, and hands because the cutouts were “intrinsically useful (perhaps even necessary) to make the costume wearable.” *Silvertop Assocs. v. Kangaroo Mfg.*, 931 F.3d 215, 221 n.5 (3d Cir. 2019). And the Eleventh Circuit recently affirmed dismissal of a copyright claim on the design of an electronic reading device because each identified element of the device was “purely functional” and thus ineligible for copyright protection. *Ross v. Apple, Inc.*, 741 F. App’x 733, 737 (11th Cir. 2018). Like these courts, the Board is required by the statute to exclude the triangular grid because of its intrinsic utilitarian nature.

Even if the grid of triangular prisms was not functional, however, it would not be a basis for copyrightability. “The Copyright Act does not protect common geometric shapes” including triangular prisms, and the Office “will not register a work that merely consists of common geometric shapes unless the author’s use of those shapes results in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1; *see also* 37 C.F.R. § 202.1(a). A sufficiently creative arrangement of shapes in an unusual pattern may provide a basis for copyrightability, but a repeating series of evenly-spaced shapes amounts to a garden variety pattern that falls short of the Copyright Act’s requirements for protection. *See Satava*, 323 F.3d at 811 (“a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship”); *see also* COMPENDIUM (THIRD) § 906.1 (providing example of picture with solid color background and evenly spaced circles as a combination of common shapes that lacks sufficient creative expression).

The remaining elements of the Work—the flat band around the side and the use of the color purple—while conceptually separable from the useful article, contain insufficient creative authorship to qualify as a protectable pictorial, graphic, or sculptural work. The flat band around the perimeter of the Work is a common geometric shape that is not used in a creative way. *See* COMPENDIUM (THIRD) § 906.1 (“the U.S. Copyright Office will not register a work that merely consists of common geometric shapes unless the author’s use of those shapes results in a work that, as a whole, is sufficiently creative”). The Work is colored in a solid purple, which applicant describes as a “coloring scheme” that has “no function or utility.” Second Request at 2. But Purple’s use of purple is mere coloration that alone is not eligible for copyright protection. *See* 37 C.F.R. § 202.1(a) (“mere variations of typographic ornamentation, lettering or coloring” are not subject to copyright); COMPENDIUM (THIRD) § 906.3 (same). Viewing all uncopyrightable elements in the work as a whole, including the grid of triangular prisms, the

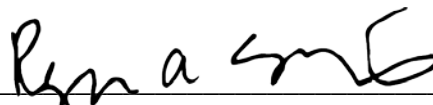
Amazing Sleep   , YOUTUBE (Oct. 26, 2017), https://www.youtube.com/watch?v=yaK5_a7L9o4 (stating at 2:00 that pillow uses as “patented comfort grid system” and showing close view of side of Work).

Board finds that their combination, selection, and arrangement is insufficiently original to be eligible for copyright protection. *See Satava*, 323 F.3d at 811.

The Board has considered Purple’s remaining arguments and found them unavailing. Purple argues that the grid on the Work is not a repeating row of triangles, but instead consists of different shapes and sizes. In support of this argument, Purple attached additional images to the Second Request, with Figures 6 and 7 in particular appearing to depict different centers and outer areas of the pillow. Second Request at Fig. 6, 7. These materials cannot be considered as a basis for copyrightability because the Board’s analysis must rest on what was submitted in Purple’s application. A registration “only covers the material that is included in the deposit,” and thus only the deposit can be considered here. COMPENDIUM (THIRD) § 504.2; *see also* COMPENDIUM (THIRD) § 1509.3(C) (encouraging applicants for sculptural claims to submit numerous images of their work “[b]ecause a registration only covers the copyrightable authorship that is clearly shown in the identifying material”). Separately, Purple invites the Board to compare the Work with a prior Review Board case because it believes the Work contains similar level of authorship. *See* Second Request at 2–3. Because prior registration decisions have “no precedential value” and are “not binding,” on the Office, COMPENDIUM (THIRD) § 309.3, the Board will not consider them here.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board
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